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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Public Service Commission of the State of New York (New York) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (Mobil App. 5-64)[1] and its opinion on rehearing (Mobil App.

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[1] In this petition references to Part I volume 2 of the printed appendix below, which has been lodged with the Court, are given as (J.A. ——), with the page reference being to the number set forth at the bottom of the page. Material in the record below not included in this volume of the Joint Appendix are cited as (R. ——). References to the separate appendix being filed with the Court in

3-4) are not yet reported. The opinion (No. 598 of the Federal Power Commission (J.A. 559-668) and its opinion on rehearing (No. 598-A, JA 866-879) are reported at 46 F.P.C. 86 and 46 F.P.C. 633.

JURISDICTION

The judgment of the court of appeals was entered April 16, 1973 (Mobil App. 1-2), and petitions for rehearing were denied on June 11, 1973 (Mobil App. 3-4). On June 18, 1973, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to September 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The relevant provisions of Sections 4, 5 and 19(b) of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w are set out as Appendix D to the petition in Case No. 73-437 (Mobil App. 65-69).

QUESTIONS PRESENTED

1. In the face of a clear conflict with the Court of Appeals for the District of Columbia with respect to the validity of similar provisions in a contemporaneous area rate proceeding, whether the court below properly affirmed the Commission's approval of provisions for refund credits and contingent escalations of flowing gas rates, calculated to provide gas producers with more

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connection with the petition brought by Mobil Oil Corporation from the same opinion of the court of appeals in No. 73-437 are given as (Mobil App. ———). Citations to the Opinion of August 24, 1973 of the Court of Appeals for the District of Columbia Circuit in *Texas Gulf Coast Area Natural Gas Rate Cases*, copies of which have been lodged with the Court as a Supplement to the Mobil petition, are given as (S. ——).

than three quarters of a billion dollars in excess of the just and reasonable rates fixed on a cost basis for gas from the Southern Louisiana Area, and admittedly discriminatory in their effect on both producers and gas consumers.

2. Whether the Commission had the power to forgive a quarter of a billion dollars in refunds ordered by a final Commission decision in a previous area rate proceeding which had been held to be free of error by the court of appeals, because the present Commissioners disagreed with policy determinations underlying two aspects of the cost determination in the previous decision.

3. Whether the Commission's acceptance without modification of a "settlement package" presented by a consensus of the industry parties to an area rate proceeding, but opposed by other parties thereto, was a proper exercise of its regulatory responsibilities under the Natural Gas Act.[2]

STATEMENT

This petition for review presents for consideration of the Court what we believe are important and novel questions with respect to the prescription of maximum area rates for new and flowing gas by the Federal Power Commission which were not before this Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). This Court's decision in *Permian* gave general approval to the Commission's determination to fix the maximum

[2] If certiorari is granted, New York reserves the right to argue that the Court erred in approving the Commission's opinion insofar as it priced casinghead gas at the same rate levels as gas well gas, and fixed October 1, 1968 as the dividing date between new and old gas, and to its action in Opinion 598 in also excusing producers from paying certain refunds originally ordered by the Commission in a 1964 in-line proceeding totally unrelated to the present area rate case.

rates at which producers may sell natural gas in interstate commerce on an area basis and to its determination to provide separate rates for new and old gas.

In the present case, the second proceeding decided by the Commission with respect to gas production from the Southern Louisiana area—the Commission with some modifications—only two of which we take issue with here [3]—followed its previous opinions in *Permian* and the several other area rate proceedings decided prior to mid-1971 in fixing separate area rates for new and old gas primarily on the basis of its evaluation of the costs of such production. In addition, however, pursuant to the provisions of a "settlement package" sponsored by some of the parties to the proceeding, it excused producers from any further obligation with respect to approximately $250,000,000 in refunds due under its previous Southern Louisiana Area Rate decision and provided for a so-called "refund credit" under which the remaining $150,000,000 in refunds could be forgiven upon the dedication of additional reserves at the higher just and reasonable new gas rates it established, as well as a series of contingent escalations of the rates for flowing gas which could provide additional revenues to the producers estimated to amount to $750,000,000. The propriety under the standards of the Natural Gas and Administrative Procedure Acts of these massive non-cost supplements to area rates already greatly in excess of those established for the same area three years earlier, is the primary focus of the present petition.

Background

As of the time of this Court's decision in the *Permian Basin Area Rate Cases*, *supra*, in May, 1968, the Federal Power Commission had already initiated and had in various stages of completion three other area rate proceed-

[3] See note 2, *supra*.

ings, involving the Southern Louisiana (Docket No. AR61-2), Hugoton-Anadarko (Docket No. AR64-1) and Texas Gulf Coast (Docket No. 64-2) production areas respectively. The hearings in the Southern Louisiana case had been completed, an Initial Decision of the Presiding Examiner had been issued, exceptions filed and oral argument held.

On September 25, 1968, the Commission issued its final decision in the *Southern Louisiana Area Rate Proceeding* by its Opinion 546 (40 F.P.C. 530). The Commission's decision, closely following the approach it had taken in *Permian*, established ceiling rates for gas well produced under contracts dated before 1961—the approximate date by which producers achieved a capacity for directional drilling for gas which made the price for new sales a significant factor in the search for gas—and for all "casinghead" or oil well gas—at 17 cents per Mcf for gas produced in the offshore regions and 18.5 cents per Mcf for onshore gas subject to the Louisiana severence tax. Current costs for new gas well gas were found to be 16.5 cents offshore and 18.8 cents onshore, but the ceiling rates for new gas well gas sold through the date of the Commission's decision were set at 18.0 cents and 19.5 cents respectively. Moreover, in a departure from *Permian* a new "third vintage" was established for gas sales contracted for after the Commission's decision, with rates of 18.5 and 20.0 cents per Mcf, respectively, applicable to this gas. Refunds of sums collected by producers in excess of these rates were ordered by the Commission.

On rehearing (41 F.P.C. 301) the Commission reaffirmed these determinations and expressly rejected requests to stay the payments of the refunds it had ordered (41 F.P.C. at 338). A stay was, however, secured by the producers from the Court of Appeals for the Fifth Circuit pending review of the Commission's opinion

therein. Review of the decision was sought both by producers asserting that the rates were too low and by consumer interests asserting that they were too high. However, in *Southern Louisiana Area Rate Cases (Austral Oil Co.* v. *Federal Power Commission*, 428 F.2d 407, 444 F.2d 125 (5th Cir., 1970), the Commission's decision was "sustained in full" (428 F.2d at 441), despite the court's expressed doubts as to whether the Commission had properly explained the basis for the non-cost elements of its rates (428 F.2d at 427, 441) or had given adequate attention to the effect of its action on gas supply or industry structure (428 F.2d at 434-440, 441-443). The Court made clear, however, that its mandate was not intended to preclude the Commission from changing or setting aside the approved rates in the new area rate proceedings involving Southern Louisiana which the Commission had initiated (428 F.2d at 442).

A number of petitions for rehearing were filed, directed *inter alia*, to the scope of the new proceedings. Pursuant to the court's request for responsive pleadings, the Commission indicated its doubts as to whether a court which had affirmed an agency action could authorize any retrospective reopening of that action and asked, instead, that the Court remand the case to the Commission (J.A. 745-749). The court in a brief *per curiam* opinion on rehearing, stated that it intended to permit the Commission to "reopen *any* part of its order that circumstances require be reopened" and that the Commission could make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest so required (444 F.2d at 126-127). At the same time, the court "emphasized" that its judgment was "an affirmance and not a remand" as the Commission had requested (id. at 127). And with specific reference to the refund situation, the court stated (ibid.):

> ". . . it may be that the Commission will decide that the refunds it has ordered are just and reasonable

or at least that their significance to the public interest is outweighed by the confusion or delay that would result from their reopening. Or it may be that the refunds are too burdensome *in the light of new evidence* to be in the public interest. *In that case,* it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders" (emphasis added).

Petitions for certiorari were filed by a number of parties, including New York. In its brief in opposition, the Commission stated (at p. 15) that evidence concerning the present and future gas supply had been introduced in the new Southern Louisiana proceedings, and that in its opinion it would not be in the public interest to order the refunding of $375,000,000 owed by the producers until it can be determined in the light of that evidence "(1) the effect the rules would have on the adequacy of supply to meet consumer needs, (2) the effect the refunds would have on the ability of producers to provide the capital for exploration and development programs, and (3) the effect on the number of competitors in the search for natural gas." This Court denied the petitions for certiorari. *Municipal Distributor Group* v. *Federal Power Commission,* 400 U.S. 950 (1970).

The Present Proceeding

As indicated, the Commission, at the time it denied rehearing of its opinion in the earlier *Southern Louisiana Area Rate Proceeding* had initiated a new proceeding (AR69-1) with respect to the area. This proceeding was originally limited to a determination whether rates for third vintage gas well gas from offshore Southern Louisiana should be increased or fourth vintage ceilings established (R. 11,030-41, 41 F.P.C. 378). However, by order of December 15, 1969 (R. 11,360-71), the Commission enlarged the scope of this proceeding to include review of the rates for all vintages of gas from the

entire Southern Louisiana area. Early in the course of the hearings, a settlement conference was convened at the request of some of the parties, and negotiations proceeded, parallel with the hearings, throughout much of 1970.

On November 6, 1970, a motion was made by one of the parties to these discussions "for promulgation of a settlement proposal" for resolution of the proceeding (J.A. 669-702). This proposal provided for rates for all new gas (sales under contracts dated after October 1, 1968) of 26 cents per Mcf, both onshore and offshore, and for flowing gas at 22.375 cents onshore and 21.375 cents offshore, with automatic escalations of 0.5 cents for flowing gas as of October 1, 1973 and of 1.0 cents for new gas as of October 1, 1974. In addition, all refunds due under its earlier opinion were to be forgiven except for an amount fixed by a complex formula at $150,000,000, and the producers were authorized to work-off payment of even this amount by commitment of additional gas reserves at the higher new gas rates. The settlement proposal also provided for a series of 0.5 cent per Mcf contingent escalations of flowing gas rates in the event producers dedicated specified amounts of reserves to the interstate market by October 1, 1977.

The Commission on November 9, 1970, noticed the settlement proposal and asked for comments thereon (R. 11,694). A large number of responses were filed, including objections to the adoption of the settlement by several major producers, New York, the City of Memphis, and the American Public Gas Association. On December 24, 1970, the Commission issued an order (R. 11,995-97, 44 F.P.C. 1638), which reopened its earlier Southern Louisiana proceeding (Docket No. AR62-1), consolidated it with the new Southern Louisiana proceeding (AR69-1), and provided that any additional evidence in the consolidated hearing was to be filed by February 15, 1971.

In the same order, the Commission incorporated into the record of the consolidated proceeding the settlement proposal referred to above. On January 26, 1971, the consolidated proceeding was further expanded to apply to all Section 4 rate suspension proceedings and Section 7 certificate proceedings involving sales in the area which had been or might be instituted during the course of the proceeding (R. 12,047). And, on March 15, 1971, the Commission granted a motion to waive the filing of an Intermediate Decision by the Presiding Examiner and providing for the omission of oral argument before the Commission (R. 12095-97).

On July 16, 1971, the Commission issued its final Opinion and Order in the consolidated proceeding (Opinion 598 (J.A. 582-668). In this opinion the Commission purported to consider the individual aspects of settlement proposal on their merits rather than as a settlement, in view of the lack of agreement among the parties thereto (J.A. 594). But its decision approved the settlement in its entirety, without any modification. In so doing, it made clear that its determinations on key points were influenced by the fact that the settlement proposal had wide industry support, including support by distributor groups (J.A. 589, 597, 601) and it called "particular attention" to representations by the producers supporting the settlement, that its approval would establish a climate for increasing gas search activities and make a major contribution towards bringing forth gas supplies to meet the demands of all customers supplied by the area (J.A. 630). On rehearing, it reaffirmed these views, modifying or clarifying its previous order only to the extent necessary to ensure that it adhered to the letter and intent of the settlement proposal (J.A. 866-879).

The Court of Appeals for the Fifth Circuit, in the opinion to which the instant petition is directed, affirmed the Commission in all particulars (Mobil App. 5-64).

In its opinion, the existence of a critical gas supply shortage and the continuing experimental nature of area pricing gave the Commission broad discretion in determining the appropriate ceiling rates for sales of both flowing and new gas, and the Commission's acceptance of the terms of the proposed settlement, was fully within its discretionary authorization (Mobil App. 13, 20-27). Specifically, it upheld as reasonable exercises of such discretion, the reduction in outstanding refund obligations by about $250,000,000 the refund credit provisions applicable to the remaining $150,000,000 obligation, and the contingent escalations of flowing gas rates. The possible discriminatory aspects of the latter two provisions, the Court concluded (Mobil App. 45-51), were not fatal since all producers would secure some benefit from the Commission's action and rate relief to consumers was less significant in the circumstances than the potential for larger gas dedications if producer revenues were increased.

REASONS FOR GRANTING THE WRIT

This case presents substantial questions of importance to the administration of the Natural Gas Act as to the propriety of action by the Federal Power Commission in authorizing natural gas producers in the Southern Louisiana production area to receive over a billion dollars in revenues from gas consumers *over and above* the just and reasonable area rates it had fixed for new and old gas from the area. With respect to a major portion of this huge sum, a clear conflict of the circuits exists which can only be resolved by this court. The remaining $250,000,000 presents serious issues as to the power of a court to permit and the Commission to authorize a retrospective increase in rates which the Commission had previously found to be just and reasonable, and the courts had affirmed on review. And permeating all of the chal-

lenged Commission actions are serious questions as to the nature of the consideration which the Federal Power Commission must give to a proposed "settlement" of a litigated adjudicatory proceeding which is opposed on its merits by a number of the parties.

1. The Commission approved, without modification, a "settlement" of a major area rate case sponsored by most but not all of the parties to the proceeding. This settlement fixed the rates for new gas in the other Southern Louisiana area at a level 6.0 cents per Mcf above those the Commission fixed for such gas with the approval of the circuit court, less than three years earlier, and up to 4.375 cents per Mcf higher with respect to old, flowing gas. In addition, the "settlement" plan provided for a so-called "refund credit" under which $150,000,000 in refunds owed by some of the producers would be forgiven if they dedicated specific volumes of Southern Louisiana reserves to interstate pipelines. The proposal also called for a series of contingent escalations in the rates for flowing gas, which, we have calculated,[4] could result in increasing the cost of such gas by as much as an additional $750,000,000 in the event various amounts of new gas are dedicated to the interstate market. In both of such cases, the selling producer would, in addition, receive the new price for his gas.

The Commission (J.A. 600-601), and the court below (Mobil App. 47-50) recognized that these two proposals presented serious problems of discrimination both among producers and as to their impact upon particular pipeline purchasers and gas consumers. The Commission

[4] The basis for New York's calculation was submitted to the Federal Power Commission in its Petition for Rehearing (J.A. 842, n.1), and was not challenged by the Commission in its Opinion 598-A on rehearing (J.A. 866-879), or in its brief in the court below. The producer intervenors supporting the Commission asserted in their brief below that the New York estimate appeared to be too high, but did not suggest any appropriate lower figure.

nevertheless approved the two provisions as appropriate stimuli to additional exploration during a period of gas shortage (J.A. 628-629, 654). And the court of appeals affirmed, primarily on the grounds that the Commission in a time of gas shortage has virtually unlimited discretion to experiment with non-cost supplements to area rates which it believes may produce additional gas for the interstate market, regardless of record support for their need or utility, or their discriminatory application (Mobil App. 45-51).

Virtually the same refund credit and contingent escalation provisions had previously been adopted by the Commission as an integral feature of its Opinion 595 in the *Texas Gulf Coast Area Rate Proceeding*, 45 F.P.C. 674 (1970), rehearing denied 46 F.P.C. 827 (1971).[5] In a decision of August 24, 1973 in *Texas Gulf Coast Area Natural Gas Rate Cases (Public Service Commission for the State of New York, et al.* v. *Federal Power Commission)*, the Court of Appeals for the District of Columbia Circuit (S. 1-111) has unanimously reversed the Commission's decisions in that case to the extent it there approved the refund credit and contingent escalations. The District of Columbia Circuit, for the reasons set forth at length in Judge Leventhal's opinion (S. 47-70) found that the Commission's adoption of both the contingent escalation and refund credit provisions in the *Texas Gulf* case had been made in the light of an inadequate record and findings which completely failed to dem-

[5] The only difference was that in the Texas Gulf Coast decision, the contingent escalations of flowing gas rates, provided for half cent escalations upon dedications of a total of 4 trillion and 6 billion feet of gas respectively, and an additional one cent when a total of 10 trillion feet of gas had been dedicated, whereas in Southern Louisiana, all three escalation steps were to be one-half cent in amount and were to take place when total area dedications reached 7.5 trillion, 11.25 trillion and 15 trillion cubic feet, respectively. No explanation for these differences was given by the Commission in its opinions in either proceeding.

onstrate the need or efficacy for the additional non-cost allowances to the producers or to properly evaluate or explain the necessity for the admittedly discriminatory aspects of both incentive provisions.

While the two area rate proceedings did not follow identical paths to the contemporaneous Commission opinions, there is no material distinction between the two insofar as the validity of the refund credit and contingent rate escalation provisions are concerned. There were brief supplemental hearings on the settlement proposal in the Southern Louisiana case, but no testimony was introduced in support of the two provisions other than a brief explanation of how they would operate. Specifically, there is nothing in the record which establishes the need for additional flowing gas revenues over and beyond those otherwise fixed as the just and reasonable levels,[6] or that demonstrates that there would be a likelihood of substantially greater producer activity on behalf of the interstate market as a result thereof.[7] And the Commission's findings in its Opinions 598 and 598-A in the Southern Louisiana proceeding which can conceivably be

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[6] The Commission in its brief below pointed to references in its opinion (R. 625-626) to testimony by the witness Winger as to the decline in capital formation for gas exploration and development, allegedly because of the lack of appropriate price incentives. Mr. Winger did not suggest, however, that if the rates set for new gas were themselves adequate as an incentive, producers would still lack access to adequate capital resources for an optimum exploratory effort. On the contrary, he testified (R. 4795) that the price of oil, and internally generated funds from oil sales play a much greater role in the availability and usage of funds in the petroleum industry than either the price of gas or funds internally generated by gas sales.

[7] As Judge Leventhal pointed out in his decision in the *Texas Gulf Coast* case, *supra* (S. 57-58), "It is elementary in the petroleum industry that capital is provided for exploration in an area long before there are any funds flowing from that area—demonstrated, e.g., by the funds invested in Alaska, and in purchase of Gulf Coast offshore leases offered by the Interior Department."

said to support the two provisions are if anything less sufficient than those the District of Columbia Circuit found to be totally inadequate in the *Texas Gulf Coast* case, *supra*. Compare J.A. 597, 599-601, 628-629, 648-649, 654, 870-871, 894 with 45 F.P.C. 709-711, 46 F.P.C. 830, 833.

The District of Columbia Circuit expressly recognized that its holdings setting aside the refund credit and contingent escalation provisions of the Commission's Texas Gulf Coast Area Rate opinion were in direct conflict with those of Fifth Circuit in the present case (See S. 55, 65, 69, 72). While New York agrees with the position of the District of Columbia Court and the reasons it gives for disagreeing with the opinion under review, we recognize, of course, that only this Court can effectively resolve the conflict, which goes to the heart of the Commission's powers and regulatory policies under the Natural Gas Act. Failure to do so can only result in leaving the Commission's basic regulatory efforts with respect to natural gas producers in an indefinite limbo certain to adversely effect the common objectives of all parties to the dispute.

2. In its original 1968 *Southern Louisiana Area Rate Decision*, 40 F.P.C. 530, the Commission fixed just and reasonable rates and ordered refunds for collections in excess thereof, with interest at 7%. These refunds, which have never been paid, amount to about $375,000,000. In the present case, however, the Commission approved provisions of the proposed "settlement" which completely eliminated all but $150,000,000 (which was in turn to be subject to the "refund credit" provision discussed above). The propriety of this massive forgiveness raises additional issues calling for this Court's review.

While the Commission's Opinion ordering these refunds was expressly "affirmed" in *Austral Oil Co.* v. *Federal Power Commission*, 428 F.2d 407, 444 F.2d 125 (5th Cir., 1970), certiorari denied *sub nom. Municipal Dis-*

tributor Group v. *Federal Power Commission*, 400 U.S. 950, the Court of Appeals purported to authorize the Commission, in the new proceedings involving the Southern Louisiana Area it had initiated, to modify its outstanding rates retrospectively as well as prospectively, 428 F.2d at 441-442, 444 F.2d at 126-127. With specific reference to the provisions of the Commission's earlier opinion ordering refunds, the Court indicated that the Commission would have authority to excuse all or part thereof, if it could find that their payment would impair the producers' ability to conduct an adequate gas search effort. 444 F.2d at 127.

New York remains of the view set forth in our petition for certiorari from the court of appeals opinion in *Austral*, *supra*, that the court of appeals lacked authority to authorize the Commission to retrospectively reopen and change a final Commission decision it had found to be free of legal error.[8] However, in its opinion approving the industry settlement the Commission did not attemp to support the complete forgiveness of about $250,000,000 of the producers' existing refund obligations on grounds of their need for additional capital to permit an adequate gas search effort—the circumstances the court of appeals had stated would justify such action (see pp. 6-7, *supra*). Instead, its justification is solely that "Opinion No. 546 did not afford an adequate return and it understated the requirements for exploration" (R. 653).

While such changes in policy with respect to those two items of cost, if otherwise supportable on the record, might justify establishing new and higher rates for the gas on a prospective basis, they neither establish the invalidity of the Commission's previous opinion nor relate to any circumstance which conceivably could justify the court of appeals' action in authorizing the reopening of the earlier proceeding. Moreover, on their own terms,

[8] The point was preserved in our pleadings with the Commission in the remanded proceeding (see J.A. 837), and our brief below.

no relationship existed, or was asserted by the parties or the Commission, between the asserted increases in costs for these two items and the arbitrary formula by which the actual refund levels were set, or the $150,000,000 limitation thereon.

The Court below did not attempt to defend the $250,000,000 reduction in refund obligations either on the basis given by the Commission or on the grounds it had previously advanced in its *Austral* opinions as justification for authorizing any retrospective reopening of the Commission's final order in the earlier case. Instead, its position is that the stipulated amount of refunds—$150,000,000—is more than would be required if the rates established in the new opinion for flowing gas for periods subsequent to October 1, 1968 had been made applicable to the prior periods, and that, in any event, the Commission under the terms of Section 4(e) of the Natural Gas Act has virtually unlimited discretion in determining whether to order refunds when it determines that rates have been collected subject to refund at levels in excess of those found to be just and reasonable (Mobil App. 44-45). As to this latter statement, the District of Columbia Circuit's Opinion in the *Texas Gulf Coast* cases, *supra*, (S. 68-69) makes clear the severe limitations on any discretion the Commission might have to refuse to order refunds for suspended collections above a just and reasonable rate.[9] And the fact that the Commission subsequently set higher rates for flowing gas sales made after October 1, 1968 has nothing whatsoever to do with the propriety of refunds for periods prior to that date or-

[9] The District of Columbia's discussion of the need for the Commission to consider the discriminatory effects of such a forgiveness order in view of the mandate of Sections 4 and 5 of the Natural Gas Act, is particularly applicable to the Southern Louisiana situation where a very large percentage of the refunds owed under the Commission's original decision were the obligation of a few large producers who had continued to charge high out of line rates throughout the period prior to the Commission's 1968 decision.

dered by a final Commission decision, affirmed on appeal. The short of the matter is that the Commission did not attempt to justify the quarter billion dollar gift to a few producers on the basis that the court of appeals had previously rested its unprecedented (and, we believe, unlawful) authorization for retrospective consideration of the matter, and the lower court, in turn, has not affirmed the Commission's action on the basis of the unsupportable reasons advanced by the Commission.

3. The decision below also raises substantial questions with respect to the extent that the Commission can give its imprimatur to a "settlement package" objected to by a number of parties because the proposal allegedly "is supported by the overwhelming majority of consumer, pipeline and producer interests" (R. 589). We do not disagree with the Commission and the court below either as to the utility of settlement agreements among the parties as a valuable adjunct to the regulatory process, or to the propriety of the Commission considering settlement proposals, not joined in by all of the parties as possible resolutions *on the merits* of the contested issues in a proceeding (see, *e.g.*, *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204, 224 (D.C. Cir., 1960), certiorari denied 364 U.S. 913). But the Commission in the present proceeding has, with the approval of the lower court, gone far beyond this to delegate its statutory responsibilities for determining the level and nature of just and reasonable rates to a consensus of the parties in the proceeding.

Since the settlement proposal was directly opposed by a number of the parties to the proceeding, and suggestions for its substantial modification had been advanced by a number of other parties, the Commission initially recognized (J.A. 590-591) that it could not consider the proposal as a true "settlement" in which the parties agree to an *ad hoc* resolution of the issues in a proceed-

ing without agreeing to any principles underlying the end result or establishing any precedents applicable in future proceedings. In its Opinions 598 and 598-A, however, the Commission not only adopted the settlement proposal in its entirety, but made clear that in at least several significant respects it had chosen one possible conclusion, rather than others whose merits it recognized, because it had been embodied in the settlement proposal. Specifically, with respect to a number of critical areas *including* the refund credit and contingent escalations, the Commission made clear that it was accepting provisions, to which New York and other parties objected, in large part *because* they were part of the "settlement package" (R. 874) and that it believed their admittedly discriminatory features were outweighed by the "broader acceptability of the UDC proposal with the distributor group" (R. 599-601).

Echoing (R. 591) the statement of the court below in its earlier *Austral* opinion, 428 F.2d at 434, n. 86, that "widespread use of the settlement technique would result in negotiation pitting market forces against each other on an aggregate scale, overseen by the Commission", the Commission concluded that accepting the settlement proposal in its entirety was appropriate because "its wide support helps to provide stability in prices in the area and relieve the administrative burdens of the Commission and to reduce the probabilities of future litigation" (R. 601). And on rehearing, it conceded that it had been "heavily" influenced by the "breadth of the support given the settlement in selecting the rate design proffered to us" (R. 870). Its decision to do so, it went on to state, involved "policy questions" to which the Courts, as well as opposing parties like New York [10] had no real basis for objecting (*ibid.*).

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[10] While New York had made clear its objections to various provisions of the proposed settlement in its original comments thereon,

The Commission elsewhere in its opinion (R. 630) makes clear that it had given "particular attention" to a provision in the settlement proposal in which the producers adhering thereto had represented that the ceiling prices and other provisions contained therein would "make funds available to the producing industry and create a regulatory atmosphere which should provide an incentive for a substantial increase in exploratory and developmental activities." The Commission's desire to avoid giving the producers an opportunity to blame any future adverse developments on its deviation from the "settlement package" they had thus sponsored may be understandable. But it does not, we suggest, comport with its responsibilities under the Natural Gas and Administrative Procedure Act.

The court of appeals recognized the serious nature of the issue (Mobil App. p. 23), but did not find it necessary to address itself thereto since it found (without further reference to the Commission's all-or-nothing syndrome) that the Commission's determinations on the individual issues fell with a "zone of reasonableness". We do not think that this constitutes an adequate judicial response to an admittedly serious problem. Even assuming the reviewing court could find record evidence upon which it believed the individual portions of the Commission's decision could have been sustained, (but see pp. 11-17, *supra*) we do not believe the Commission can properly choose between conflicting positions on the basis of which carries the support of the majority of the parties in the proceeding, to say nothing of a majority

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the Commission in Opinion 598 stated it regarded New York's position as being "at least neutral or giving to a settlement proposal", because it supported higher prices than that fixed in the previous Southern Louisiana decision (R. 597). "Once higher revenues are conceded as being necessary", the Commission stated, it was proper for it to consider specific rate level and rate design questions "in the light of the quasi-bargaining position of the parties" (ibid.).

of the industry entities being regulated. Yet that is what it has admittedly done here.

CONCLUSION

For the reasons set forth above, the opinions below raise substantial questions of importance to the administration of the Natural Gas Act requiring plenary review and determination by this Court.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
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